



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

January 28, 2003

Ms. Bryn Meredith  
Taylor Olson Adkins Sralla Elam, L.L.P.  
6000 Western Place, Suite 200  
Fort Worth, Texas 76107-4654

OR2003-0584

Dear Ms. Meredith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175634.

The City of Haltom City (the "city"), which you represent, received a request for 1) information related to city council members' receipt of the Code of Ethics; 2a) information received from the Texas Ethics Commission from January 1, 2002 until the present; 2b) information received from the commission by certain individuals or sent to the commission by these individuals in connection with a certain ethics complaint; 2c) legal opinions given to certain individuals in connection with the ethics complaint and a certain executive session item; 2d) information sent to or received from a named law firm from July 1, 2001 until the present; and 3) any affidavits or disclosure statements signed and filed by certain city council members from March 12, 2001 until October 30, 2002. We note that your request for a decision does not address items 1 and 3 above, nor have you raised any exceptions to disclosure of this information. We assume that the city has released this information to the extent that it exists. If it has not, it must do so at this time. *See* Gov't Code §§ 552.021, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under circumstances). You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You contend that the documents in Exhibit B are confidential under section 571.140 of the Government Code and must therefore be withheld from disclosure pursuant to

section 552.101 of the Public Information Act as information that is “confidential by law, either constitutional, statutory, or by judicial decision.” Section 571.140 provides in relevant part:

(a) Except as provided by Subsection (b), proceedings at a preliminary review or informal hearing performed by the [Texas Ethics Commission], a sworn complaint, and documents and any additional evidence relating to the processing, preliminary review, informal hearing, or resolution of a sworn complaint or motion are confidential and may not be disclosed unless entered into the record of a formal hearing or a judicial proceeding, except that a document or statement that was previously public information remains public information.

(b) An order issued by the commission after the completion of a preliminary review or an informal hearing determining that a violation other than a technical or de minimis violation has occurred is not confidential.

Gov’t Code § 571.140(b), (c). A review of the information at issue indicates that the documents are related to the referenced sworn complaint that was filed with the Texas Ethics Commission (the “commission”). The commission considered whether section 571.140 acts as a broad prohibition against disclosure of an ethics complaint and related documents in Ethics Advisory Opinion No. 8 (1992). Based upon federal court cases that had interpreted similar provisions, the commission determined that such a broad restriction would violate the First Amendment to the United States Constitution. Ethics Advisory Opinion No. 8 at 2-4. *See generally Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (law allowing criminal prosecution of a newspaper for printing information about complaint proceedings was unconstitutional); *Doe v. Gonzalez*, 723 F. Supp. 690 (S.D. Fla. 1988) *aff’d* 886 F.2d 1323 (11<sup>th</sup> Cir. Fla. 1989) (statute prohibiting a complainant from discussing ethics complaint was unconstitutional); *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989) (law prohibiting all public discussion of an ethics complaint was unconstitutional). The commission opinion construed this confidentiality provision to apply only to members and staff of the commission, not to third parties. We defer to the commission’s interpretation of its own statute in this situation.<sup>1</sup> *See Texas Water Comm’n v. Brushy Creek Mun. Util. Dist.*, 917 S.W.2d 19, 21 (Tex. 1996) (“[T]he construction of a statute by an agency charged with its execution is entitled to serious consideration unless the agency’s construction is clearly inconsistent with the Legislature’s intent”); see also Attorney General Opinions JC-0114 at 2 (1999) (same), JM-1212 at 8 (1990) (same).

Because the commission has interpreted its own confidentiality provision to restrict disclosure of the complaint and related documents only as to its own members and staff, the

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<sup>1</sup> The opinion makes clear that the commission construed the statute narrowly “because a statute is to be construed in a manner that renders it constitutional.” Ethics Advisory Opinion No. 8 at 4.

documents held by the city are not confidential under section 571.140. We note that the complaint and related documents in this situation are held or owned by the city and are therefore subject to chapter 552 as public information within the definition of section 552.021.

We now turn to your claim under section 552.103 of the Government Code for the documents in Exhibit B. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a). Contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation under section 552.103. See Open Records Decision No. 588 at 7 (1991).

You advise that by virtue of their positions with the city, certain city officials are parties to pending litigation before the commission. You state that the relevant proceeding in relation to the sworn ethics complaint constitutes a contested case under the APA. Based on the information you have provided, we find that the information at issue relates to pending litigation to which the city is a party. However, if the opposing party in the litigation has provided or had access to any of the information, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In this case, it appears that all of the information in Exhibit B has either been

acquired from or provided to the commission on behalf of the city. Therefore, you may not withhold any of the information under section 552.103.

However, some of the information in Exhibit B may be confidential under section 552.117. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential in accordance with section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, to the extent the current or former employees whose information is at issue elected under section 552.024, prior to the request, to keep the personal information we have marked confidential, you must withhold it under section 552.117(1) of the Government Code. You may not withhold this information under section 552.117 for current or former employees to the extent they have not made timely elections under section 552.024.

Furthermore, appearing throughout Exhibit B is an e-mail address that must be withheld under section 552.137 of the Government Code. Section 552.137 requires the city to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. *See* Gov't Code § 552.137(a), (b). Section 552.137 does not apply to a general e-mail address of a business or to a government employee's or official's work e-mail address. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted information. Therefore, the city must withhold the e-mail address we have marked under section 552.137.

We now address your claim under section 552.107 of the Government Code in relation to the information in Exhibit C. We note that the first document in Exhibit C is not responsive to the request for legal opinions given to the city council members and two named individuals in connection with the ethics complaint. Therefore, we do not address the non-responsive information and you are not required to release it. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney

acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform this office that the information at issue constitutes communications not intended to be disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of professional legal services to the client. Upon review of your arguments and the information, we conclude that it is covered by the attorney-client privilege, and therefore, it may be withheld from disclosure under section 552.107(1).

In summary, the personal information we have marked in Exhibit B must be withheld under section 552.117 to the extent that the current or former city employees made timely elections pursuant to section 552.024. You must withhold the e-mail address we have marked throughout Exhibit B under section 552.137. The responsive information in Exhibit C may be withheld under section 552.107. The remaining requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

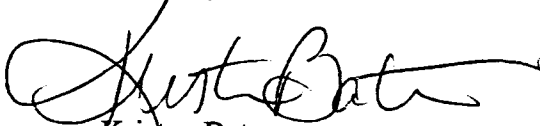
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristen Bates", with a stylized, flowing script.

Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/seg

Ref: ID# 175634

Enc. Submitted documents

c: Mr. Tom Quinones  
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(w/o enclosures)